

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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BANK OF AMERICA, N.A.,

Plaintiff,

-against-

GORDON KESSLER,

Defendant.

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APPEARANCES:

For Plaintiff: Steven Gerber, Esq.
Adorno & Yoss LLP
305 Fifth Avenue, Suite 5720
Empire State Building
New York, NY 10018

N. Noelle Letcher, Esq.
Adorno & Yoss LLP
155 Willowbrook Boulevard, Suite 300
Wayne, NJ 07470

For Defendant: No appearance

SEYBERT, District Judge:

Magistrate Michael L. Orenstein issued a Report and Recommendation ("R&R") on August 20, 2009. As part of the R&R, Judge Orenstein warned that any objections were to be filed with the Clerk of the Court within ten days of service of the R&R. Within the required time-period, Plaintiff Bank of America, N.A. ("BofA") submitted a letter, addressed to Judge Orenstein, that amounted to an Objection to the R&R. Over this Objection, for the reasons that follow, the Court adopts the R&R in its entirety.

"When evaluating the report and recommendation of a magistrate judge, the district court may adopt those portions of the report to which no objections have been made and which are not

facially erroneous." Walker v. Vaughan, 216 F. Supp. 2d 290, 291 (S.D.N.Y. 2002) (citation omitted). However, if a party serves and files specific, written objections to a magistrate's report and recommendation within ten days of receiving the recommended disposition, see FED. R. CIV. P. 72(b), the district "court may accept, reject, or modify, in whole or in part, the findings and recommendations made by the magistrate judge." 28 U.S.C. §636(b)(1)(C); see also Fed. R. Civ. P. 72(b). When a party raises an objection to a magistrate judge's report, "the court is required to conduct a de novo review of the contested sections." See Pizarro v. Bartlett, 776 F. Supp. 815, 817 (S.D.N.Y. 1991). However, "[w]hen a party makes only conclusory or general objections, or simply reiterates his original arguments, the Court reviews the Report and Recommendation only for clear error." Barratt, 2002 U.S. Dist. LEXIS 3453, at *2 (citations omitted).

In the present case, BofA objects to the R&R's conclusion that service was improper. On September 4, 2009, in a supplementary application, BofA submitted its letter and supporting brief in lieu of a more formal submission in support of its application for a default judgment against defendant Gordon Kessler ("Kessler"). Contained therein, was the following representation:

Following receipt of the Report and Recommendation, our office carefully reviewed our initial application. At that time, it was noted that a critical Affidavit of Mailing had inadvertently been omitted as an exhibit to Plaintiffs prior application. See the

accompanying Supplemental Declaration of N.
Noelle Letcher, Esq, at ¶ 13, Exhibit A.

(Pl.'s Letter App. dated Sept. 4, 2009.) The Supplemental Declaration of N. Noelle Letcher, Esq. indeed states that "the referenced Affidavit of Mailing was omitted from Plaintiff[']s Bank of America, N.A. previous application for a request for notation of default." Unfortunately, the letter application still fails to include the original Affidavit of Mailing as an attachment. Without this Affidavit, the Court cannot deem service proper.

Accordingly, the Court adopts the R&R in its entirety. Plaintiff's application for entry of a default judgment is DENIED with leave to renew if Plaintiff (1) attempts to re-serve the Defendant and (2) provides evidence that proper service was effected.

SO ORDERED.

/s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.

Dated: September 14, 2009
Central Islip, New York